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In the Supreme Court of the United States

JUAN DEREYES, FRANK JACOBY and MICHAEL FENNER,
PETITIONERS
v.
SHAUN WILKINS and ROY BUCHNER, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a Section 1983 Fourth Amendment unlawful detention claim governed by the tort of malicious prosecution—so as to subject police officers to potential liability for post-arrest actions that do not qualify as "searches" or "seizures" by the police?

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

This case offers the Court an opportunity to resolve a fundamental issue in the interpretation of 42 U.S.C. § 1983 that has long vexed—and sharply divided—the lower courts: whether a Section 1983 claim premised on an alleged violation of the Fourth Amendment can subject police officers, and by extension their governmental employers, to liability for post-arrest actions that do not qualify as "searches" or "seizures." In this case, as in many of the other cases on both sides of the circuit split identified in the petition, that issue arises in the context of a so-called "Fourth Amendment malicious prosecution claim" that is based in small part on an arrest that was alleged to have violated the Fourth Amendment, but in which the plaintiffs seek to hold the defendant officers liable for an entire prosecution—including a trial and conviction. But the same underlying issue also arises in other contexts, such as alleged brutality directed towards individuals after an arrest, or towards prison inmates. Because of the wide and entrenched circuit conflicts, this Court's intervention is needed to resolve the confusion and, in the process, reduce or eliminate the chilling effect that these overbroad Section 1983 actions are currently having on legitimate police work.[1]

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[1] Counsel of record received timely notice pursuant to Rule 37.2 of *amicus'* intention to file this brief, and the parties have consented to its submission. Pursuant to Rule 37.6, the *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus*, its members, or its counsel made

The Tenth Circuit's decision here is a particularly egregious example of the willingness of some lower courts to "leverage" an alleged violation of the Fourth Amendment into potential Section 1983 liability for post-arrest activities, including activities that are largely the responsibility of prosecutors, prison officials, or other participants in the criminal justice system. In this case, for example, the plaintiffs' "malicious prosecution" complaint alleges that the plaintiffs "suffered damages," not only by reason of an allegedly unlawful arrest, but also as a result of being "incarcerated for many months * * * and tried without probable cause in violation of the Fourth Amendment * * * ." App. at 17. Yet even though the plaintiffs' extended incarceration and trial cannot reasonably be considered "seizures" by the defendant police officers under the Fourth Amendment, the court of appeals still allowed those claims to proceed under what it termed a "Fourth Amendment malicious prosecution" theory. As explained in the petition, the Ninth Circuit has taken a similar approach, in conflict with decisions of other circuits, including the Fourth, Fifth and Seventh Circuits.

The issues presented here are of particular interest to DRI—The Voice of the Defense Bar ("DRI"). DRI is an international organization of attorneys defending the interests of businesses and individuals in civil litigation. Many of DRI's members regularly represent governmental entities in litigation under Section 1983. In fact, DRI has established a Governmental Liability Committee whose primary focus is Section 1983 litigation. That committee's activities

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a monetary contribution to the brief's preparation or submission

include hosting an annual seminar for attorneys who defend governmental entities, publishing articles of interest to those attorneys, and monitoring trends in Section 1983 litigation in the federal appellate courts. DRI also frequently participates as an *amicus curiae* in cases of interest to its membership.

DRI urges the Court to grant review and to hold, as the Fifth Circuit did in *Castellano* v. *Fragozo*, 352 F.3d 939, 959 (5th Cir. 2003) (Higginbotham, J., en banc), that at least for purposes of Section 1983 actions against arresting police officers, "the umbrella of the Fourth Amendment, broad and powerful as it is, casts its protection solely over the pretrial events of a prosecution."

STATEMENT

This case began with the 1996 execution-style murder of Ben Anaya, Jr. and Cassandra Sedillio in a remote New Mexico cabin. Pet. App. at 3. Sedillio's two children, aged two and three, were present at the murders. *Ibid.* They were locked inside the cabin and left to starve. *Ibid.* Six months later, Ben Anaya, Sr. discovered the four bodies. *Ibid.*

Based on statements made to police by two witnesses, plaintiffs Shaun Wilkins and Roy Buchner were arrested and charged with the four murders. *Id.* at 8. At their criminal trials, both contended that the police had unlawfully coerced the incriminating statements. *Id.* at 8-9. After Buchner's and Wilkins' trials ended in a hung jury, the prosecutor dismissed the charges, reserving the right to retry them. *Id.* at 9.

Wilkins and Buchner then brought suit pursuant to 42 U.S.C. § 1983 against the police officers involved in arresting them. The complaint alleged that

the officers had violated plaintiffs' Fourth Amendment rights by using unlawfully procured statements to arrest, charge and prosecute them. App. at 17. They sought liability and damages not only for the allegedly unlawful arrest, but also for their subsequent prosecution and trial. *Id.* at 17-18.

After the District Court denied the defendants' motion to dismiss on qualified immunity grounds, they filed an interlocutory appeal. The Tenth Circuit affirmed, (Pet. App. at 34), and in so doing made two critical rulings. First, it allowed the plaintiffs to proceed on the theory that the defendants had violated Section 1983 and the plaintiffs' Fourth Amendment rights by committing the tort of malicious prosecution. *Id.* at 14. Second, it also endorsed the view that the plaintiffs could recover not only for the alleged Fourth Amendment violation—their unlawful arrest—but also for their subsequent prosecution and trial. *Id.* at 18, 19.

SUMMARY OF ARGUMENT

The plaintiffs in this case sought, and the Tenth Circuit approved, a theory that subjects arresting police officers to Section 1983 liability for alleged violations of the Fourth Amendment comprising not only "searches" and "seizures" but also post-arrest prosecutions. Such potential liability for post-arrest events discourages police officers from performing their principal functions—preventing and investigating crime. And, because local governments may also be liable for the officers' Section 1983 violations, the Tenth Circuit's decision encourages police departments to train officers to *avoid* using the full extent of their authority under the Fourth Amendment. These unfortunate results, moreover, are based upon

an interpretation of the Fourth Amendment that is inconsistent with this Court's precedents.

This case presents the Court with an opportunity not only to rectify these problems, but also to resolve two important and closely related circuit conflicts: First, does Section 1983 allow a cause of action, premised on the Fourth Amendment, for an entire malicious prosecution? Second, and more fundamentally, do the protections of the Fourth Amendment (and hence Section 1983 claims based on alleged violations thereof) extend to post-arrest activities that are neither "searches" nor "seizures"? This case squarely presents both questions and is an excellent vehicle for resolving them.[2]

ARGUMENT

I. Allowing Section 1983 Plaintiffs To Tack Malicious Prosecution Claims Onto Alleged Fourth Amendment Violations Based On Post-Arrest Conduct That Is Not A "Search" Or A "Seizure" Greatly Expands The Potential Liability Faced By Police Officers And Their Employers--An Expansion That Can Be Rectified Only By This Court.

By holding that police officers may be liable under Section 1983 for post-arrest conduct even if that conduct does not constitute a "search" or "seizure" under the Fourth Amendment, the Tenth Circuit's decision frustrates the police's ability to perform their principal function—solving crimes—and is flatly con-

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[2] *Amicus* supports review of all three questions presented in the petition, but focuses here on the question of greatest concern to its members—Question 1—which fairly encompasses both of these closely related circuit conflicts.

trary to the Fourth Amendment's language and this Court's decisions construing it.

A. Applying the Fourth Amendment to post-arrest confinement and prosecution not only threatens the financial security of police departments, but is likely to deter legitimate crime-solving efforts.

Under the malicious prosecution theory advanced by the plaintiffs, and accepted by the Court of Appeals, police officers are liable not only for illegal searches and seizures, but also for an ensuing criminal prosecution. Moreover, because Section 1983 authorizes money damages against government entities, see, *e.g.*, *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658 (1978), expanding Fourth Amendment-based Section 1983 claims to cover activities that do not qualify as searches or seizures transforms both Section 1983 and the Amendment into a "font of tort law"—something this Court has warned must not be allowed to occur. *Paul* v. *Davis*, 424 U.S. 693, 700-701 (1976).

At the same time, the Tenth Circuit's decision deters legitimate crime-fighting efforts. Once a police officer becomes aware that a Fourth Amendment violation may trigger liability not only for an arrest but also for the entire prosecution and trial, that officer may be more cautious about investigating crime—more cautious, in fact, than the Fourth Amendment actually requires. Similarly, police departments, wary of expanding their *Monell* liability, will be reluctant to train officers to use the full extent of their authority or to provide clear guidance on officers' Fourth Amendment responsibilities. Neither the public nor the courts will benefit from such hesitancy.

Further, while adherence to constitutional norms is important, the Tenth Circuit's penalty for violating those norms—making the officer liable not only for an actual violation of the Fourth Amendment but also for subsequent events that emphatically do not violate it—goes too far. Sufficient protections against Fourth Amendment violations already exist. For example, unlawfully obtained evidence is already barred from trial under the exclusionary rule articulated in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), and the "fruit of the poisonous tree" doctrine announced in *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963). Further, Section 1983 provides a civil remedy for conduct that, unlike the post-arrest events at issue here, is within the control of the police officers and actually violates the Fourth Amendment. Thus, while the police can and should be expected to bear the cost of a violation of the Fourth Amendment, they cannot and should not expect to be liable under the Fourth Amendment for post-arrest conduct largely under the control of other government officials.

B. Extending the protections of the Fourth Amendment beyond searches and seizures to include trial-related activities is contrary to the Amendment's plain language, as well as this Court's decisions.

Not only is the Tenth Circuit incorrect as a matter of policy, but its reasoning is also contrary to the Fourth Amendment's language and this Court's case law. By its terms, the Fourth Amendment prohibits only "unreasonable searches and seizures." U.S. Const. amend. IV. And this Court has carefully defined the Amendment's key terms in an effort to strike the proper balance between an individual's right to be free from unwarranted government intru-

sion and the government's need to protect its citizens from wrongdoers.

For example, in *California* v. *Hodari D.*, 499 U.S. 621 (1991), this Court held that seizure "requires either physical force * * * or the submission to some show of authority." *Id.* at 626 (emphasis deleted). And in so holding, *Hodari* rejected the contention that there is such thing as a "continuing arrest" *Id.* at 625. That holding strongly implies that once a defendant has been taken into custody, any Fourth Amendment seizure is complete. Indeed, writing for the Fourth Circuit in *Riley* v. *Dorton*, 115 F.3d 1159 (4th Cir. 1997) (Wilkinson, J., en banc), Judge Wilkinson made that point explicitly, holding that "the text of the Fourth Amendment—prohibiting unreasonable 'seizures'—does not support its application to a post-arrest encounter." *Id.* at 1163 (quoting *Brothers* v. *Klevenhagen*, 28 F.3d 452, 456 (5th Cir. 1994)).

Further, in *Graham* v. *Connor*, 490 U.S. 386 (1989), this Court reiterated its oft-repeated statement that "the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396 (internal quotation marks and citation omitted). Similarly, *Graham* noted the carefully drawn definition of a "seizure" that applies in the Fourth Amendment context. *Id.* at 395 n.10. And it instructed courts to judge a Section 1983 plaintiff's claims "by reference to the specific constitutional standard * * * rather than to some generalized * * * standard." *Id.* at 394.

By imposing liability on arresting officers for events that occur after arrest, the Tenth Circuit's decision violates fundamental Fourth Amendment principles and thus permits Section 1983 plaintiffs to use the Fourth Amendment to punish activities that do not remotely violate the Amendment. That is improper, and the Tenth Circuit's decision should be reversed.

II. The Courts of Appeal Are Deeply Split On The Relationship Among The Fourth Amendment, The Tort of Malicious Prosecution And Section 1983

The Tenth Circuit's decision also exacerbates a widespread circuit conflict over the relationship among Section 1983 and the Fourth Amendment. As outlined in the petition for certiorari, and as previously recognized by this Court, the courts of appeal are deeply split on the availability of a malicious prosecution claim asserted under Section 1983 and premised on an initial alleged Fourth Amendment violation by the arresting officer. See Cert. Pet. at 16-17 (describing circuit split); *Wallace v. Kato*, 549 U.S. 384, 390 n.2 (2007) (noting "a range of approaches in the lower courts" but declining to address the split) (citation omitted). But that circuit split is in turn based upon an even more fundamental conflict among the circuits and one that is fairly encompassed within the first question presented—over whether a Section 1983 plaintiff may rely on the Fourth Amendment to recover damages not only for his or her arrest, but also for events following an arrest.

A. The Petitioners, like the Fifth Circuit in *Castellano* v. *Fragozo*, have accurately described the sharp conflict among the circuits on the existence of a stand-alone Section 1983 claim for malicious prosecution.

The petition for certiorari accurately describes the current split among the circuits about the relationship among Section 1983, the Fourth Amendment and a malicious prosecution claim. In short, some circuits recognize the existence of a malicious prosecution claim under Section 1983 and require proof of all the common law elements of that tort. Cert. Pet. at 16-17. Others, however, such as the Fifth Circuit in *Castellano*, hold that stand-alone Section 1983 malicious prosecution claims do not exist, looking instead directly to the Fourth Amendment (supplemented by relevant elements of the common law) to analyze claims styled as sounding in malicious prosecution. *Ibid.*

B. The circuit split described in the petition stems from a deeper split over whether the protections of the Fourth Amendment extend beyond searches and seizures to entire prosecutions, including trials.

The circuit conflict on the existence of a Section 1983 cause of action for malicious prosecution is not the end of the matter, however, because the conflict goes even deeper. In addition to the validity of a malicious prosecution claim, the first question presented also implicates whether, as the Tenth Circuit necessarily held, the Fourth Amendment's prohibition on unreasonable seizures can apply to

post-arrest conduct at all. The first question presented asks whether "a Section 1983 Fourth Amendment unlawful detention claim [is] governed by the tort of malicious prosecution?" (Cert. Pet. at i.) But the existence of any such claim necessarily implicates the question of *when* the Fourth Amendment applies to a Section 1983 defendant's conduct. This Court expressly reserved that question in *Graham*, noting that "[o]ur cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection * * * beyond the point at which arrest ends and pretrial detention begins, and we do not attempt to answer that question today." 490 U.S. at 396 n.10.

Without guidance from this Court, the circuits have adopted squarely conflicting positions on whether the Fourth Amendment's prohibition on unreasonable seizures applies post-arrest. The Fourth, Fifth and Seventh Circuits hold that this prohibition does not apply once an individual's arrest is complete. By contrast, the Ninth and Tenth Circuits hold that the prohibition continues to apply post-arrest. And this conflict also merits the Court's attention—and resolution.

1. In *Castellano* v. *Fragozo*, 352 F.3d 939 (5th Cir. 2003) (Higginbotham, J., en banc), the Fifth Circuit held that a Section 1983 plaintiff who alleges that his arrest violated the Fourth Amendment may recover damages only for the arrest itself, and not for a subsequent prosecution or trial, even if the same evidence used to obtain the warrant is also presented at trial. *Id.* at 959. As Judge Higginbotham, relying on *Albright* v. *Oliver*, 510 U.S. 266 (1994), explained:

> [T]he umbrella of the Fourth Amendment, broad and powerful as it is, casts its protection solely over the pretrial events of a prosecution. This much is implicit in *Albright*'s insistence that the source of constitutional protection is the particular amendment offering an explicit and extended source of protection against a particular sort of government behavior.

Ibid. (citing *Albright*, 510 U.S. at 277-281).

In *Castellano*, the plaintiff had alleged that the police had violated the Fourth Amendment and Section 1983 by using false evidence and perjury to obtain an arrest warrant, and by using that same evidence to secure a conviction at trial. *Id.* at 959. Rejecting the plaintiff's argument that he could use the Fourth Amendment to challenge not only his arrest but also his subsequent prosecution and trial, the court observed:

> [I]t is * * * plain that [Castellano's] arrest, even his indictment, did not lead inevitably to his trial and wrongful conviction and the damages flowing therefrom. Rather, the prosecution of this case relied on the continuing cooperation of the [police officers named as defendants in the Section 1983 action] at each of its subsequent phases. * * * And while Castellano may recover for all injury suffered by its violation, the Fourth Amendment will not support his damages arising from events at trial and his wrongful conviction.

Ibid.

Like the Fifth Circuit, the Fourth and the Seventh Circuits have also held that the Fourth Amendment's protection against unreasonable sei-

zures does not apply post-arrest In *Riley* v. *Dorton*, 115 F.3d 1159 (4th Cir. 1997) (Wilkinson, J., en banc), for example, Judge Wilkinson explained that the Fourth Amendment does not provide the constitutional predicate for a Section 1983 suit alleging that the police abused the plaintiff following his arrest. *Id.* at 1163. As previously noted, Judge Wilkinson held that "the text of the Fourth Amendment—prohibiting unreasonable 'seizures'—does not support its application to a post-arrest encounter." *Ibid.* (quoting *Brothers* v. *Klevenhagen*, 28 F.3d 452, 456 (5th Cir. 1994)). That protection "does not stand alone * * * but is coupled with strictures on the issuance of warrants, indicating that the Amendment is directed at the *arrest* of persons * * * ." *Ibid.* (emphasis in original).

Likewise, Judge Posner, writing for a unanimous Seventh Circuit panel in *Wilkins* v. *May*, 872 F.2d 190 (7th Cir. 1989), explained that post-arrest events do not fall within the ambit of the Fourth Amendment's prohibition against unreasonable seizures. As in *Riley*, the plaintiff in *Wilkins* alleged that the police violated the Fourth Amendment by abusing him after he was taken into custody. *Id.* at 191-192. The Seventh Circuit rejected the plaintiff's attempt to apply the Fourth Amendment to the officers' post-arrest conduct in part because "[t]he problem with this argument is that Wilkins had already been seized. He was seized when he was arrested." *Id.* at 192. And, "[a] natural although not inevitable interpretation of the word 'seizure' would limit it to the initial act of seizing, with the result that subsequent events would be deemed to have occurred after rather than during the seizure." *Id.* at 192-193. More recently, the Seventh Circuit has explained that the "effective holding

of *Wilkins* [is] that Fourth Amendment protections do not extend beyond the point of arrest." *Lee* v. *City of Chicago*, 330 F.3d 456, 463 n.4 (7th Cir. 2003).

2. In contrast to the Fourth, Fifth and Seventh Circuits, the Ninth and the Tenth Circuits hold that the Fourth Amendment's protection against unreasonable seizures does extend beyond the point of arrest. In another case alleging post-arrest abuse, *Austin* v. *Hamilton*, 945 F.2d 1155 (10th Cir. 1991) (abrogated on other grounds by *Johnson* v. *Jones*, 515 U.S. 304 (1995)), the Tenth Circuit explicitly disagreed with the Fourth Circuit's conclusion in *Wilkins* that this Fourth Amendment protection does not apply once an individual's arrest is complete. *Id.* at 1163 n.3. According to the Tenth Circuit, applying the Fourth Amendment's protections against unreasonable seizures after the point of arrest is necessary by analogy to the Fourth Amendment's restrictions on warrants:

> [J]ust as the [F]ourth [A]mendment's strictures continue in effect to set the applicable constitutional limitations regarding both duration (reasonable period under the circumstances of arrest) and legal justification (judicial determination of probable cause), its protections also persist to impose restrictions on the treatment of the arrestee detained without a warrant.

Id. at 1160.

The Tenth Circuit gave no logical justification for this attempt to analogize the Fourth Amendment's warrant provision to its seizure provision, much less attempt to justify its extension of the Amendment's protection against "unreasonable seizure" to the

"treatment" of an arrestee. Its reasoning on this point is thus pure *ipse dixit*. But in all events, it is clear from this statement that the Tenth Circuit has extended that protection to encompass an inquiry into whether the police have acted reasonably after an arrest. The Fourth Amendment, however, does not broadly prohibit all unreasonable government action. Instead, it prohibits only unreasonable "searches and seizures."

Nevertheless, the Ninth Circuit has likewise adopted the Tenth Circuit's approach. In *Pierce* v. *Multnomah County*, 76 F.3d 1032, 1043 (9th Cir. 1996), the Ninth Circuit relied on *Austin* to hold that "the Fourth Amendment sets the applicable constitutional limitations on the treatment of an arrestee detained without a warrant up *until the time such arrestee is released or found to be legally in custody based upon probable cause for arrest*." Id. at 1043 (emphasis added). The Ninth Circuit, then, has joined the Tenth Circuit in holding that conduct that cannot fairly be characterized as a "search" or "seizure" can nevertheless give rise to Section 1983 liability as long as it is premised upon some alleged violation of the Fourth Amendment.[3]

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[3] The Second Circuit likely agrees with the Ninth and Tenth Circuits that the Fourth Amendment's prohibition on unreasonable seizures applies to post-arrest activity. In *Powell* v. *Gardner*, 891 F.2d 1039 (2d Cir. 1989), the Second Circuit, considering another allegation of post-arrest abuse by a Section 1983 plaintiff, stated that "[w]e think [that] the Fourth Amendment standard probably should be applied at least to the period prior to the time when the person arrested is arraigned or formally charged, and remains in the custody * * * of the arresting officer." *Id.* at 1044.

3. The decision below exemplifies the circuit split. When describing the elements of what it called a "Fourth Amendment malicious prosecution" cause of action under Section 1983 (Pet. App. at 18), the court explained that, to state such a claim, the plaintiffs had to show, among other things that "no probable cause supported the *original arrest, continued confinement, or prosecution.*" *Ibid.* (emphasis added). By definition, "continued confinement" or "prosecution" following an "original arrest" involves events that occur after the arrest is complete. Holding that such events can support a Fourth Amendment "malicious prosecution" cause of action under Section 1983 clearly indicates that, in the Tenth Circuit's view, the plaintiffs have a Fourth Amendment right that continues to apply after the initial seizure—in fact all the way through the end of a trial.[4]

Indeed, the Tenth Circuit's view goes well beyond even the continuing seizure theory advocated by Justice Ginsburg in her concurrence in *Albright* v. *Oliver*, 510 U.S. 266 (1994). There, Justice Ginsburg expressed the view that an individual can be seized by virtue of post-arrest events such as restrictions on travel, the legal duty to respond to a court summons, and the like. *Id.* at 278-279 (Ginsburg, J., concur-

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[4] Nor can the court's statements about the officers' liability for post-arrest activities be taken as mere remarks about damages or causation. The court made clear that it would not consider arguments addressed to damages because "at the qualified immunity stage we have no jurisdiction to address any causation issues." (Pet. App. at 25-26.) Thus, when the court indicated that the plaintiffs could hold the arresting officers *liable* for post-arrest events merely because those events were allegedly preceded by a Fourth Amendment violation, it meant exactly what it said

ring). But even under Justice Ginsburg's view, these kinds of post-arrest events violate the Fourth Amendment precisely because they arguably qualify independently as "seizures" for Fourth Amendment purposes.

Here, by contrast, the Tenth Circuit clearly understood that the only actual seizure that might have occurred in this case was the plaintiffs' initial arrest—based on warrants containing allegedly coerced testimony. But the Tenth Circuit nevertheless allowed that seizure to transform the plaintiffs' subsequent prosecution and trial into a free-standing Fourth Amendment violation because those warrants "supplie[d] the necessary *connection* between the malicious prosecution cause of action and Plaintiffs' Fourth Amendment allegations." Pet. App. at 18 (emphasis added). In that court's view, then, it was not even necessary for the plaintiffs to establish a "continuing seizure"; all that is required is a "connection" between an initial seizure and subsequent activities qualifying as "malicious prosecution." In other words, in the Tenth Circuit's view, the plaintiffs can challenge and recover for all post-arrest prosecution activity simply by showing that the initial arrest violated the Fourth Amendment.

In sum, not only is there is a deep circuit split over whether a Section 1983 plaintiff may bring an action for malicious prosecution, there is an even more fundamental circuit split over when the Fourth Amendment's protections against unreasonable seizures applies. Under the law of the Fourth, Fifth and Seventh Circuits, the Fourth Amendment applies only to an actual seizure, such as an arrest. Under the law of the Ninth and Tenth Circuits, however, the Fourth Amendment's protection against unreason-

able "seizures" also applies to post-arrest prosecution activities. Only this Court can resolve this fundamental conflict.

III. This Case Provides An Excellent Vehicle For Resolving These Conflicts.

This case provides the Court with an excellent vehicle for resolving these conflicts and in so doing to clarify that the Fourth Amendment's protection against unreasonable seizures does not apply to post-arrest events such as prosecution and trial.

A. Especially when viewed in light of the complaint, the decision below clearly and inappropriately permits the plaintiffs to challenge their entire prosecution, not only their allegedly unlawful arrest.

One reason this case provides a good vehicle for resolving these conflicts is that the plaintiffs' complaint makes very clear that they seek to invoke the Fourth Amendment to challenge not only their initial arrest, but also their post-arrest confinement and trial. The complaint alleges that the plaintiffs "suffered damages as a result of [d]efendants' actions in that they were arrested, *incarcerated for many months* * * * *and tried without probable cause in violation of the Fourth Amendment* . . .."App. at 17-18 (emphasis added).

Consistent with its own precedent, the Tenth Circuit's decision below endorsed the plaintiffs' broad view of the protection afforded by the Fourth Amendment. The Tenth Circuit explained that it was affirming the denial of qualified immunity because "factual questions exist regarding whether the officers fabricated evidence and then relied on it in

arresting *as well as causing their prosecutions*." Pet. App. at 2 (emphasis added). The court thus read the plaintiffs' claims to cover not only the plaintiffs' arrests but also their subsequent prosecutions. And the court allowed the plaintiffs to maintain those claims even though they go well beyond the plaintiffs' arrests.

Although, as previously explained, the Tenth Circuit's view of the Fourth Amendment is consistent with that of the Ninth Circuit, it is directly contrary to the law in the Fourth, Fifth and Seventh Circuits, which hold that the Fourth Amendment's prohibition on unreasonable seizures does not apply beyond an individual's arrest. Thus, had this case been brought in the Fourth, Fifth, or Seventh Circuits, those courts would not, as the Tenth Circuit did, have allowed an attempt to impose liability for actions that do not qualify as seizures under the Fourth Amendment. Instead, those courts would have granted the defendants qualified immunity for the post-arrest events alleged in their complaint.

Here, in short, the plaintiffs' ability to maintain their "Fourth Amendment malicious prosecution claims" depends critically on their ability to bring those claims in the Ninth or Tenth Circuits, rather than in another circuit—such as the Fourth, Fifth, or Seventh—that limits the sweep of the Fourth Amendment's protection to genuine "searches" and "seizures." Thus, this case squarely presents the issue at hand and provides the Court with an excellent opportunity to resolve it.

B. If this Court holds that a Section 1983 claim premised upon Fourth Amendment violations is limited to unlawful searches or seizures, it will be necessary to reverse the Tenth Circuit's decision.

If this Court adopts the position of the Fourth, Fifth and Seventh Circuits and holds that a Section 1983 claim based on a Fourth Amendment violation is limited to unlawful searches and seizures, reversal will be both appropriate and necessary.

A Section 1983 defendant is entitled to qualified immunity if his conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 268 (1993). Here, the critical basis for the Tenth Circuit's rejection of petitioners' qualified immunity defense was its view that plaintiffs' Fourth Amendment-based Section 1983 claim properly encompasses not only their arrest but also the defendants' role in "causing their prosecutions" (Pet. App. at 2), and that the defendants are thus liable under Section 1983 not only if "no probable cause supported the original arrest," but also if there were no probable cause to support the plaintiffs' "continued confinement, or prosecution." *Id.* at 18. If the court below had adopted the more limited understanding of the proper sweep of Fourth Amendment-based Section 1983 claims embodied in the decisions of the Fourth, Fifth and Seventh Circuits, the court would have had no choice but to sustain the petitioners' qualified immunity defense, at least to the extent that the plaintiffs' complaint seeks to impose liability for activities other than their initial arrest.

It follows that if this Court adopts the position of the Fourth, Fifth and Seventh Circuits, it will be both necessary and appropriate to reverse the decision below.

CONCLUSION

At bottom, the court below, like the Ninth Circuit before it, sought to expand the sweep of Fourth Amendment-based Section 1983 claims to situations where that Amendment simply does not apply. And the lower court's position has serious practical consequences for police officers and their employers as they carry out their difficult duties. Accordingly, the petition should be granted, and this Court should use this case to clarify that Section 1983 claims based upon alleged Fourth Amendment violations are necessarily limited to activities traditionally understood to constitute "searches" and "seizures," and cannot be used to challenge an entire prosecution.

Respectfully submitted.

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JANUARY 2009

APPENDIX

APPENDIX A

In the United States District Court
For the District of New Mexico

SHAUN WILKINS and,
ROY BUCHNER

Plaintiffs,

vs. CIV-02-0980 LH
RLP

DETECTIVE JUAN
DeREYES, Albuquerque
Police Department;
AGENT FRANK JACOBY,
New Mexico Department of
Public Safety; SERGEANT
MICHAEL FENNER,
New Mexico Department
of Public Safety,

Defendants.

COMPLAINT FOR VIOLATION OF CIVIL RIGHTS

JURISDICTIONAL STATEMENT

1. This civil rights action is brought pursuant to 42 U.S.C. §§ 1983 and 1988. Plaintiffs, citizens of New Mexico, are seeking damages for the Defendants' unconstitutional conduct.

2. The court has jurisdiction pursuant to 28 U.S.C. § 1331. This action arises under the Fourth, Fifth and Fourteenth Amendments to the United

States Constitution and 42 U.S.C. § 1983. Defendants denied Plaintiffs their due process right to a fair trial by knowingly coercing false confessions from other suspects and alleged witnesses with the specific purpose and effect of using those confessions against Plaintiffs at trial. In addition, Defendants maliciously prosecuted Plaintiffs causing them to be incarcerated for years in violation of their right to be [free] from unlawful seizure as protected by the Fourth Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment.

3. The events complained of occurred in the counties of Torrance, Bernalillo and Santa Fe, New Mexico.

PARTIES

4. Plaintiff Roy Buchner is now and was at all times material to this complaint a citizen of Albuquerque, Bernalillo County, or Corrales, Sandoval County, New Mexico.

5. Plaintiff Shaun Wilkins is now and was at all times material to this complaint a citizen of Albuquerque, Bernalillo County, New Mexico.

6. Defendant Juan DeReyes was at the time of the incidents complained of and at all material times a detective in the Albuquerque Police Department. At the time of the complained of incidents and the 5 years prior thereto, he was working as a member of the Metro Gang Unit, Special Investigations Division, a local police officer working with a federal task force. His job was to try to suppress crimes committed by the 18th Street Gang. He was the main interrogator in this incident. At all times material hereto, Defendant DeReyes was an officer, employee or agent

of the Albuquerque Police Department and was acting under color of state law. He is sued in his individual capacity.

7. Defendant Frank Jacoby was at the time of the incidents complained of and at all material times an officer, employee or agent of the New Mexico Department of Public Safety and was acting under color of state law. He is sued in his individual capacity.

8. Defendant Michael Fenner was at the time of the incidents complained of and at all times material an officer, employee or agent of the New Mexico Department of Public Safety and was acting under color of state law. He is sued in his individual capacity.

FACTS

9. On April 14, 1996, state officials found the bodies of Ben Anaya, Jr., 17, his girlfriend, Cassandra Sedillo, 23, and her three and four-year-old sons in a cabin in the town of Torreon, County of Torrance, New Mexico. Anaya and Sedillo had been murdered by gunshot sometime in December 1995. After Anaya, Jr. and Sedillo were shot, the children were locked inside the cabin. They died of starvation and dehydration three to four weeks later. Ben Anaya, Sr. owned the cabin where the murders occurred.

10. At the time of the murders, Ben Anaya, Jr., Lawrence Nieto, Shawn Popeleski, Shaun Wilkins and Roy Buchner were all members of the 18th Street Gang in Albuquerque, New Mexico.

11. On November 30, 1995, Popeleski was "ranked out" of the 18th Street Gang ("ranking out" is the

equivalent of being kicked out, and the person ranked out is usually beaten). Plaintiff Wilkins initiated the ranking out. Ben Anaya, Jr. had knowingly driven Popeleski to the place where he was to be ranked out and did not warn Popeleski that he was about to be ranked out. Popeleski was injured in the process. As a result of being ranked out, Popeleski lost the respect and trust of the 18th Street Gang.

12. In spite of Anaya, Jr.'s actions, Popeleski was living with victim Ben Anaya, Jr. in December, 1995. He spent about two weeks at the cabin with the victims in December 1995, just prior to the murders.

13. On or about April 15, 1996, Defendants DeReyes, Jacoby and Fenner started interviewing witnesses and interrogating suspects, including the Plaintiffs, Lawrence Nieto and Shawn Popeleski.

14. As a result of the police interrogations (described below, paragraphs 38-68), on May 11, 1996, Defendant DeReyes procured a warrant for Shaun Wilkins and unlawfully arrested him. Plaintiff Shaun Wilkins was accused as the triggerman in the deaths of Anaya, Jr. and Sedillo. He was charged with four counts of first-degree murder and other crimes related to the incident. The District Attorney sought the death penalty.

15. Plaintiff Roy Buchner was unlawfully arrested on a warrant by Defendant Jacoby on May 13, 1996. Buchner was accused of participating in the homicides of the adults, and then locking the cabin door and trapping the children inside. He was charged with four counts of first-degree murder and other crimes related to the incident. The District Attorney sought the death penalty.

16. Lawrence Nieto was convicted as an

accomplice in the four murders and was sentenced to 130½ years in prison. Shawn Popeleski was convicted of two counts of Second Degree Murder and sentenced to 16 years in prison.

17. Wilkins and Buchner were accused of the crimes because Defendant DeReyes was extraordinarily hostile to Wilkins and had a personal vendetta against him, and Buchner was known to be a good friend of Wilkins. DeReyes believed Wilkins had previously committed a drive-by shooting on his home, forcing his family to move.

18. Over the course of numerous police interrogations, DeReyes and the other Defendants coerced Lawrence Nieto and Shawn Popeleski into falsely saying that it was Wilkins and Buchner who had committed the crimes. In doing so, they knew or should have known they were contriving multiple murder charges against innocent men in which the death penalty would likely be sought and in which lengthy incarceration in deplorable conditions was highly likely.

Procedural History

19. Prior to Wilkins' criminal trial, Wilkins moved to exclude Lawrence Nieto's prior testimony from his own trial as well as Nieto's statements made in pre-trial interviews with police officers. Nieto had said in some coercive interrogations conducted by the Defendants that Wilkins and Buchner committed the murders at the cabin and that he (Nieto) was there. The judge denied the motion. Similarly, Roy Buchner moved to exclude Nieto's statements. The trial court allowed the use of Nieto's videotaped statement of a police interrogation on May 15, 1996, but not Nieto's testimony at his own trial.

20. Nieto and Popeleski refused to testify at Buchner's and Wilkins' trials, asserting their right to remain silent under the Fifth Amendment of the United States Constitution. All the Defendants herein testified at both Plaintiffs' trials. Though he refused initially to testify, Nieto nonetheless made statements under oath during Buchner's trial in which he said or implied that the statements coerced from him by Defendants were false.

21. Both Plaintiffs' criminal trials ended in hung juries and both trial courts declared mistrials.

22. Both Plaintiffs renewed their motions to exclude the Nieto and Popeleski statements on retrial.

23. In *Buchner*, the trial court granted Buchner's renewed motion to exclude many of Nieto's statements: the trial testimony and videotaped interview. The State appealed.

24. The New Mexico Court of Appeals remanded the case for further proceedings to determine the admissibility of individual portions of Nieto's trial testimony and his videotaped statement at Buchner's retrial. (*State v. Buchner*, Cause No. 19, 441, Memorandum Opinion, February 23, 1999.)

25. After the rehearing, the trial court ordered exclusion of all of Nieto's testimony as unreliable. The New Mexico Court of Appeals affirmed the trial court's decision excluding all Nieto's statements due to their unreliability. (*State v. Buchner*, Cause No. 20,464, Memorandum Opinion, March 21, 2000.) The New Mexico Supreme Court denied the State's petition for certiorari on May 24, 2000.

26. The trial court in Wilkins' case also excluded

the use of Nieto's statements from use at retrial due to their unreliability, which the State appealed. The appellate court upheld the exclusion of all Nieto's statements due to their unreliability. *State v. Wilkins*, Cause No. 19,296, Memorandum Opinion, February 9, 1999. The New Mexico Supreme Court denied the State's petition for certiorari on March 30, 1999.

27. After the Appellate court decisions, the State dismissed the charges without prejudice against Buchner on January 3, 2001 and Wilkins in March 2, 2001. The only evidence which placed either Wilkins or Buchner at the scene of the shootings was the coerced statements made by Lawrence Nieto, and partially acquiesced in by the true killer, Shawn Popeleski. Without the Nieto statements, there was no meaningful evidence upon which to proceed in a criminal trial.

28. Before Buchner's criminal trial, the prosecutor had produced one videotape marked "J. DeReyes, APD, 12:45 PM, 05/13/96. Lawrence Nieto, M Fenner, NMSP" (the "12:45 tape"). That tape had been considered by the trial judge and used to determine the admissibility of the statement the prosecutor admitted into evidence (May 15 tape). The May 15, 1996, interrogation was the culmination of a series of interrogations in which Nieto gave the police a variety of different stories.

29. Just prior to the rehearing on remand, Buchner's attorney found that the State had withheld an earlier videotaped statement made by Nieto on May 13, 1996 (the "12:43 tape"). The withheld tape was discovered at the prosecutor's office labeled with the same date, names and almost identical time (two

minutes difference) as the tape that had been produced. Although it appeared to be the same tape, it was not. The 12:43 tape was full of police coercion, persuasion and promises made to Nieto by Defendants for confessing or offering evidence against Wilkins and Buchner.

30. The 12:43 tape had never, prior to the first trial for each of them, been provided to an attorney or investigator for either Buchner or Wilkins and had not been considered by either trial court in determining the admissibility of Nieto's May 15, 1996 statements or his trial testimony.

31. The trial court accepted in evidence a copy of the 12:43 tape to review in making its decision on the reliability of Nieto's May 15, 1996 statement. The court decided it must listen to all the previous police interviews, including that tape, to determine the reliability and admissibility of Nieto's final statement.

32. In the trial court's findings after remand in the Buchner case, Judge Fitch said the first police interview of Nieto on May 13, 1996 "consist[ed] primarily of statements by the police officers and very little narrative by Nieto. The net effect of that Interview is to induce Nieto to confess." (*State v. Buchner*, Order on Remand, Nov. 16, 1999 at 6.)

33. During all the interrogations between May 11 and May 15, 1996, Nieto was in police custody and under the control of the police officers. Nieto was transported both to and from the interrogations on May 11, May 13, and May 15, by the State Police.

34. The court excluded the May 15 statements because they lacked any true indicia of reliability and were inherently unreliable.

35. The evidence showed that Nieto was under police coercion and offers of leniency and the police were overreaching.

Police Questioning of Lawrence Nieto

36. Lawrence Nieto was interrogated at least eight times by Defendants prior to giving his final videotaped statement (on May 15) used in Buchner's and Wilkins' first trials.

37. On April 17, 1996, Lawrence Nieto was interrogated by Defendants DeReyes and Fenner regarding the murders. Nieto denied any wrongdoing himself. He was sent back "on the street" to find out who killed his friend, Anaya, Jr. At that time, Defendant DeReyes threatened Nieto, "[I]f I find out that you're lying to me... I'll charge you with an open count of murder or conspiracy."

38. At the first interrogation, Buchner's name was not mentioned. Nieto stated he was afraid for his life and his family's lives either by a drive-by shooting or if he was in prison. His family includes several younger brothers and his grandmother. He stated he was afraid to talk to the detective because of being labeled a snitch. A snitch can get thrown out of the gang and be assassinated.

39. While interrogating Nieto, Defendant DeReyes told him that this case was personal to him. DeReyes knew Plaintiffs Wilkins and Buchner and was extraordinarily hostile to them, especially Wilkins. He told Nieto that Wilkins had committed a drive by shooting at DeReyes' own house and forced his family to move.

40. DeReyes threatened Nieto that if he did not name the killer, Nieto's brother would be killed.

41. At Nieto's second interrogation on April 19, 1996, DeReyes asked him if Buchner was at the cabin, for the first time implicating Buchner in the crimes. Defendants Fenner and Lucero were also present.

42. DeReyes was the first person to mention Wilkins' name in connection with this crime. Fenner was also present at that interview. In one interview in late April, DeReyes brought up Wilkins' name 17 times in a half hour. De Reyes pushed Nieto to name Wilkins as the killer.

43. DeReyes told Nieto that the police would protect him. Nieto eventually stated he, Wilkins and Buchner were at the cabin.

44. Nieto was given a polygraph at the State Police on April 24, 1996, the results, significance and validity of which are very doubtful. After that, Defendant Jacoby interviewed him in Old Town.

45. On May 5, 1996, DeReyes and Fenner interrogated him again.

46. At an interrogation by DeReyes and Fenner on May 11, 1996, Nieto was given Miranda rights and requested an attorney. No lawyer was provided to him, but the interrogation went forward. For the first time, Nieto implicated Shaun Wilkins in Ben Anaya, Jr.'s murder. Nieto picked Wilkins out of a photo array. Wilkins' photo was dated April 30, 1996. After that interrogation, later on May 11, 1996, DeReyes got an arrest and search warrant for Wilkins and arrested him at his home and booked him into the Bernalillo County Detention Center.

47. Nieto also identified Buchner in a photo taken December 5, 1995. The "Additional comments" on the

photo I.D. stated in Defendant DeReyes' handwriting, "Listed offender positively identified as...subject, in a drive-by shooting of a police officers home and positively identified as a possible homicide subject in the Ben Anaya case under investigation by the NMSP."

48. DeReyes offered Nieto leniency in exchange for certain testimony during the interviews. He told Nieto he would be cleared if he stated that Wilkins and Buchner were guilty. Specifically, DeReyes told Nieto that Nieto was going to give him a statement that Wilkins did the drive-by on his house, that Wilkins and Buchner were up at the cabin, and "that's how you're going to clear yourself."

49. In a May 13, 1996, interrogation by DeReyes at the New Mexico State Prison, Nieto said he was an eyewitness to the murder of all the victims.

50. Nieto admitted being at the cabin, but denied involvement. He said Popeleski was not at the cabin at all, that he, Buchner and Wilkins went to the cabin and partied. He heard gun shots, Buchner and Wilkins told him what happened, and Wilkins placed a .22 against Nieto's head and threatened to kill him if he told anyone about the incident. He said nobody was wearing masks, that Wilkins was wearing a white shirt, and he had last seen Cassandra Sedillo awake.

51. Based on that information, Agent Jacoby obtained a search warrant and arrest warrant for Buchner and picked him up for these murders on May 13, 1996. He obtained an arrest warrant for Wilkins and arrested him on May 11, 1996.

52. Nieto's statements, then his testimony at his own trial contradicted Popeleski's pretrial statements and testimony in very important ways.

53. Nieto contradicted his own statements. In a separate interrogation, Nieto stated that it was not Wilkins holding a gun to Nieto's head, but Nieto wearing a black mask and holding Popeleski captive with a shotgun given to him by Wilkins outside the cabin, and wearing a black mask.

54. Not only did Nieto give different stories in different interrogations, his stories directly contradict the only other eyewitness testimony. Nonetheless the police and prosecutors charged and prosecuted Plaintiffs based on the coerced final version of Nieto's story and Popeleski's conflicting stories.

55. On May 15, 1996, Nieto was taken into custody as a material witness.

56. On May 22, 1996, Nieto was arrested for his part in the murders. Nieto was convicted as an accomplice to the murders on August 5, 1997, in a trial in Estancia, New Mexico. He was sentenced to 130½ years in prison.

57. Nieto was called as a witness at Buchner's trial. At the trial, he repudiated his statements that Wilkins and Buchner were the killers or were even at the cabin. He testified that DeReyes pressured him into saying Wilkins and Buchner were at the cabin and committed the murders and that the police "were pushing me ... because of what Popeleski said....and were harassing me and stuff." Nieto specifically named DeReyes and Jacoby as pressuring him to name Wilkins and Buchner as the murderers.

Police Questioning of Popeleski

58. On April 15, 1996, Defendants Jacoby and DeReyes interviewed Popeleski at the Albuquerque Police Department Headquarters.

59. At that interview Popeleski said he did not know who committed the crimes. His best guess was a man named Cosby. He never mentioned the Plaintiffs.

60. Fenner and DeReyes were the first to bring up Wilkins' name in an interview with Popeleski. DeReyes knew that Popeleski had reason to be angry with Wilkins for the ranking out.

61. On April 19, 1996, Popeleski told Sgt. Fenner that Detective DeReyes and Agent Jacoby made him think Wilkins might have committed the murders. After that interrogation, Nieto and Popeleski both started telling the officers long and detailed stories of Wilkins' guilt. Upon information and belief, they were fed details by Defendants to minimize conflicts in these contrived and planted stories.

62. On April 23, 1996, Popeleski became the State's confidential informant in the Torreon cabin murder case.

63. Not until Popeleski's sixth interrogation (on or about May 10, 1996) did he mention Buchner's name and say that Buchner might have been involved in the killings.

64. On May 12, 1996, DeReyes interrogated Popeleski at the Torrance County Detention Center near Estancia, New Mexico. Popeleski identified Buchner as being at the homicide done by Wilkins.

65. DeReyes pushed Popeleski and Nieto to name

Wilkins as the person who shot the victims. Eventually they did name Wilkins as the shooter.

66. Nieto and Popeleski both admit being at the cabin at the time of the murders. Wilkins and Buchner both repeatedly denied ever having been at the cabin in Torreon.

Additional Facts

67. According to the testimony of Defendant DeReyes, one investigative technique is to "lie" and tell the interviewee that his friends snitched him off to get him to confess.

68. DeReyes testified that he believed that whenever he interviews gang members they do not tell him the truth. Yet he charged, arrested and caused Plaintiffs to be prosecuted knowing the only evidence against them was the statements of other gang members Nieto and Popeleski which DeReyes, himself, pressured and coerced these gang members to make.

69. Defendants knew that the information they used to arrest, charge and prosecute Plaintiffs was untrustworthy, unreliable and insufficient to allow a conclusion that Plaintiffs had committed the crime at issue. Defendants had no justifiable reason to rely on Nieto's and Popeleski's statements.

70. Defendants deliberately supplied coerced and misleading information to the Prosecutors, specifically including the final versions they had coerced from Nieto, which influenced the prosecutors' decisions to proceed with and seek the death penalty in Plaintiffs' trials.

71. Defendants violated Plaintiffs due process rights when they conspired to procure groundless

state indictments and charges based upon fabricated evidence, and by presenting false, distorted testimony to official bodies in order to maliciously bring about Plaintiffs' arrest, trial and conviction.

72. Plaintiff Buchner was arrested on May 13, 1996, then incarcerated in the most restrictive prison environment then available in the State of New Mexico at the New Mexico Penitentiary North Facility from two days after his arrest, May 15, 1996 until December 11, 1997, a period of more than eighteen (18) months. He was thereafter released in restrictive conditions and remained in the jurisdiction of the Court facing the death penalty on pending murder charges until all of his charges were finally dismissed on January 3, 2001. Plaintiff Wilkins was incarcerated in the most restrictive prison environment then available in the State of New Mexico at the New Mexico Penitentiary North Facility and the Torrance County Detention Facility from two days after his arrest, May 13, 1996 until April 17, 2000, a period of nearly four (4) years. Defendants denied Plaintiffs their liberty without due process of law by procuring false testimony against them, fabricating critical evidence, by arresting, imprisoning and prosecuting them without probable cause, and by conspiring to do these acts.

COUNT I

(Malicious Prosecution – Fourth Amendment Claim)

73. Plaintiffs reallege and incorporate herein paragraphs 1-72 above.

74. The criminal charges asserted against Plaintiffs by Defendants were initiated and asserted in bad faith, with no basis in fact, solely for the purpose of getting revenge on Plaintiffs, and with the

knowledge that the only evidence against them was unlawfully procured and untrue.

75. Defendants had a duty to Plaintiffs to refrain from charging them with crimes under the circumstances alleged. Defendants knew or should have known that they had such a duty. In insisting on charging Plaintiffs, causing them to be incarcerated and face trial, Defendant DeReyes, with the cooperation of and ratification by Defendants Jacoby and Fenner, willfully, recklessly and maliciously abused the process of the legal system intentionally to harm and harass Plaintiffs. Defendants used improper means to obtain evidence against plaintiffs and fabricated evidence, then used that evidence against them.

76. The acts alleged in this Count constitute the torts of malicious prosecution and malicious abuse of process.

77. Defendants primary motive in arresting and prosecuting the Plaintiffs was to accomplish an illegitimate end.

78. Plaintiffs suffered damages as a result of the Defendants' actions in that they were arrested, incarcerated for many months under very onerous conditions and tried without probable cause in violation of the Fourth Amendment to the United States Constitution.

79. Plaintiffs suffered damages as the result of Defendants' unlawful, intentional, reckless and wanton behavior, and should be awarded compensation as follows against the individual Defendants both jointly and severally:

a. A sum of damages to be determined at trial

to justly and fairly compensate them for their economic losses;

b. Damages in an amount to be determined at trial sufficient to justly and fairly compensate them for their non-economic losses;

c. Punitive damages in an amount to be determined at trial;

d. Reasonable attorneys fees and costs pursuant to 42 U.S.C. § 1988; and

e. All other relief that law and justice allow.

COUNT II

(Conspiracy to Violate Civil Rights)

80. Plaintiffs reallege and incorporate herein paragraphs 1-72 above.

81. Defendants had an agreement and acted together and in concert to inflict a constitutional injury on Plaintiffs. Defendants carried out an overt act in furtherance of their goal of depriving Plaintiffs of their right to due process under law and a fair trial, and to be free from unlawful seizure, as guaranteed by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution, as applied to the State and its political subdivisions through the Fourteenth Amendment.

82. The purpose of the conspiracy was to obtain a false conviction of Plaintiffs based on false and coerced testimony. The conspiracy was essentially to cause a malicious prosecution.

83. All Defendants carried out overt acts in furtherance of the conspiracy by participating in the interrogations of Plaintiffs and testifying against

them at their criminal trials. Defendants DeReyes and Jacoby procured warrants and arrested them.

84. Plaintiffs suffered damages as the result of Defendants unlawful, intentional, reckless and wanton behavior, which was done in violation of the Fourth, Fifth and Fourteenth Amendments and should be awarded compensation as follows against the individual Defendants both jointly and severally:

a. A sum of damages to be determined at trial to justly and fairly compensate them for their economic losses;

b. Damages in an amount to be determined at trial sufficient to justly and fairly compensate them for their non-economic losses;

c. Punitive damages in an amount to be determined at trial;

d. Reasonable attorneys fees and costs pursuant to 42 U.S.C. § 1988; and

e. All other relief that law and justice allow.

Respectfully Submitted,

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